
UNITED STATES OF AMERICA
DEPARTMENT OF LABOR

Case No. 83-ERA-12

In the Matter of

James E. Wells, Jr.
Complainant

v.

Kansas Gas and Electric
Company and its Wolf Creek
Nuclear Generating Plant in
Burlington, Kansas,
Respondent

This is a proceeding arising under section 5851 of the Energy, Reorganization Act of 1974 (ERA), as amended, 42 U.S.C. § 5851, and regulations promulgated thereunder at 29 CFR Part 24. This section prohibits employers from discriminating in terms, conditions or privileges of employment against any of their employees because the employee has engaged in protected activities.

This proceeding was initiated as a result of a complaint filed, on August 29, 1983, by James E. Wells, a contract employee performing quality assurance inspection at the Wolfcreek plant of Kansas Gas and Electric Company (KG&E). The Wolfcreek plant is an electric generating station powered by nuclear fuel, and an applicant-licensee of the Nuclear Regulatory Commission (NRC).

The complaint alleges that Wells was disciplined, discharged and refused re-employment because he had brought to the attention of KG&E's Quality Assurance Manager various safety problems relating to electric hardware and electrical installations at the plant. In response to the complaint, KG&E contends that complainant was not engaged in a protected activity because it was part of his job to identify for management quality related problems, and because he never had any contact with NRC until after his termination.

KG&E also contends that it discharged complainant for legitimate, non-discriminatory business reasons - namely, complainant's failure to verify a part of his employment and educational background coupled both with the inability of complainant to establish good working relationships with co-workers and others, and the fact that complainant damaged one of the office telephones.

A hearing[1] was held before Judge Melvin Warshaw on January 12, 13 and 20, 1984. On February 27, 1984, Judge Warshaw issued his Recommended Decision and Order (D&O) in which he found that complainant was engaged in a protected activity and that KG&E's stated reasons for the action it took against complainant were pretextual. Accordingly, Judge Warshaw recommended that KG&E be found in violation of section 5851.

Pursuant to 29 CFR 24.6(b), this matter is now before me for decision. After review of the entire record, including the arguments set forth by the parties in their post-hearing briefs, I adopt Judge Warshaw's recommended decision with the modifications and additions noted below.

The facts of this case are set forth fully in detail in Judge Warshaw's decision. More briefly, complainant began working for KG&E, on or about April 25, 1983, as a "walk-down" inspector of electrical systems. Complainant's primary duties were to determine whether the electrical equipment and its installation at the Wolfcreek plant met the quality assurance standards of both KG&E and NRC, and to identify and report existing or potential safety problems. Complainant was interviewed for his job by William Rudolf, Manager of Quality Assurance for KG&E. During the interview, Rudolf used a resume provided to KG&E by Volt Technical Services, a head hunting firm which referred complainant for the job. This resume listed, as part of complainant's educational background, "J.C. Calhoun University, Huntsville,

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AL, 1977, 20 hours credit in Electrical Systems." Complainant had not actually attended Calhoun University but had been advised by Calhoun that, if he were to attend, Calhoun would give him these credits for courses taken during his military service. The resume also noted that complainant had been employed at Daniels International, Houston, Texas from November 1978 to January 1979. After approximately two months on the job, complainant and twelve other quality assurance inspectors were called together for the purpose of filling out personal data history forms and release of information forms. On advice of the staff person handling this meeting, complainant listed the Calhoun University credits on his personal data form. Complainant also listed on this form his work experience at Daniels.

On the morning of June 20, 1983 complainant informed Rudolph of certain safety problems he had identified during his walk- downs." On the afternoon of that same day, complainant was called to a meeting in Rudolph's office at which Glenn W. Reeves,

Superintendent of Quality Control and two security guards[2] were also present. At that meeting, complainant was told by Rudolph that he was discharged because of KG&E's concerns about his relationship with staff personnel as well as individuals outside of the company and because of the damaging of the company telephone. After complainant stated that he believed that the real reason he was being fired was that he had raised quality assurance and safety concerns, he was asked to temporarily leave the room. When called back to the meeting, complainant was told that he was not being terminated but was being put on probation.

In the early part of July 1983, Equifax, an investigative firm under contract to KG&E, initiated background checks of complainant and the other quality assurance inspectors. The purpose of the background checks was to obtain the security clearance necessary for the issuance of unescorted badges to these inspectors. These badges would be needed sometime in August of 1984, a year hence. On July 13th, complainant submitted to Reeves a written report on specific quality assurance and safety concerns; the next day, Reeves gave this report to Rudolph. Around the same time, complainant brought to Rudolph's attention additional quality assurance and safety concerns, and inquired of Rudolph as to the status of the problems complainant had surfaced on June 20th. Rudolph responded that Reeves and he

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were investigating these problems. On August 2, 1983, complainant was advised, at a meeting with Personnel Manager Duane Smith, Chief of Security John Johnson and Reeves, that Equifax was unable to verify his educational credits from Calhoun and his employment at Daniels. Complainant thereupon stated that he never attended Calhoun but could produce a document which showed that he would be given degree credit for courses taken while in the military if he were to attend Calhoun, and that he could produce documentation verifying his employment at Daniels. Complainant was given until August 5th to produce such documentation; otherwise, complainant was told, he would be discharged.

On the morning of August 4th, complainant turned in for typing his handwritten notes concerning problems he had discovered with certain cable installations. Later in the day, Reeves took these notes out of the typing basket; he gave them to Rudolph the next day. Also, on the morning of August 4th, complainant notified Reeves that he needed to ask Rudolph for additional time to get his documentation from home. Additionally, sometime during the morning of the 4th, Rudolph informed Chief of Security Johnson that he was going to terminate complainant because he was certain that complainant would not be able to produce documentation of his attendance all Calhoun College. That same day, Rudolph told Reeves that he would not meet with complainant since it was complainant's last day on the job. Around noontime, Reeves told complainant that Rudolph would not meet with him since he (Rudolph) considered that the August 5th deadline was complainant's problem. Nevertheless, complainant waited till the end of the the work day hoping to meet with Rudolph. On his way out of the plant that night, complainant was

stopped by Chief of Security Johnson who advised him that Reeves wished to see him, and requested that complainant accompany Johnson to the security check point. There complainant met Rudolph and Reeves who had with them a box containing complainant's personal desk items. Rudolph informed complainant that he was terminated because his background information could not be verified. Some two weeks after his termination, complainant informed Rudolph that the verifying documentation had been delivered to the KG&E Security Office. Rudolph thereupon told the complainant that he could not get his job back but that he would be given a good reference. On August 23, 1983, Equifax completed its investigation of complainant's background.

The administrative law judge concluded that complainant's

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reporting of quality discrepancies and safety problems constituted protected activity under Section 5851 albeit such reporting was within the scope of complainant's official duties as a quality assurance inspector and was communicated only internally and not to NRC. I accept this finding. It is in complete accord with my holding on the same issue in *Mackowiak v. University Nuclear Systems*, 82-ERA-8, slip op. pp. 8-11.

The administrative law judge then went on to conclude that KG&E's stated reasons for its June 20th discipline and August 4th discharge of complainant were pretextual. I agree with his evaluation of the evidence and adopt his conclusion.

KG&E asserts that complainant has failed to establish a prima facie case of discrimination in that he has not shown, either by direct or credible circumstantial evidence, that his protected activity was a substantial or motivating factor in his termination; and KG&E argues that, even if complainant established a prima facie case, KG&E has rebutted by articulating legitimate non-discriminatory reasons for discharging the complainant.

The applicable burdens and order of presentation of proof in Section 5851 cases are set forth in my decision in *Dartey v. Zack Company of Chicago*, 80-ERA-2, slip. op. pp. 6-9.

There I held that:

> ". . .the employee must initially present a prima facie case consisting of a showing that he engaged in protected conduct, that the employer was aware of that conduct and that the employer took some adverse action against him. In addition, as part of his prima facie case, "the plaintiff must present evidence sufficient to raise the inference that . . . protected activity was the likely reason for the adverse action." (cite omitted) . . . If the employee establishes a prima facie case, the employer has the burden of producing evidence to rebut the presumption

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> of disparate treatment by presenting evidence that the alleged disparate treatment was motivated by legitimate, nondiscriminatory reasons. Significantly, the employer bears only a burden of producing evidence at this point; the ultimate burden of persuasion of the existence of intentional discrimination rests with the employee. (cite omitted). If the employer successfully rebuts the employee's prima facie case, the employee still has "the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision . . .. [The employee] may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." (cite omitted) The trier of fact may then conclude that the employer's proffered reason for its conduct is a pretext and rule that the employee has proved actionable retaliation for protected activity. Conversely, the trier of fact may conclude that the employer was not motivated, in whole or in part, by the employee's protected conduct and rule that the employee has failed to establish his case by a preponderance of the evidence. (cite omitted) Finally, the trier of fact may decide that the employer was motivated by both prohibited and legitimate reasons, i.e., that the employer had "dual motives."
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> . . . if the trier of fact reaches the latter conclusion, that the employer has proven by a preponderance of the evidence that the protected conduct was a motivating factor in the employer's action, the employer, in order to avoid liability, has the burden of proof of persuasion to show by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct. (cites omitted).

Review of the record evidence shows that Wells carried this burden by establishing a prima facie case which KG&E did not rebut because the administrative law judge concluded its proferred reasons were pretextual. Thus, it was not necessary for the administrative law judge to consider the "but for" question of whether, given mixed legitimate and illegal motives for its actions against Wells, they would have been taken even in the absence of the protected activity.

Without question, complainant has shown that he was engaged in protected conduct, and that KG&E took adverse action against him. Additionally, the "sequence of topics and actions at the June 20, 1983 meeting (D&O, p.7)," the absence of any disciplinary problem in the 44 day period between complainant's probation on June 20, 1983 and his discharge on August 4, 1984, the fact that Equifax did not complete its background investigation until 19 days after complainant's discharge, and KG&E's refusal to rehire complainant after he submitted his documentation, all constitute evidence, which, if credited, is sufficient to raise the inference that complainant's protected conduct was the likely reason for his discharge. The administrative law judge found this evidence credible and I concur in this determination.[3] Thus complainant has established a prima facie case of discriminatory discharge.

KG&E did articulate legitimate, non-discriminatory reasons for discharging the complainant. As noted in Dartey, however, presentation of such a reason does not end the inquiry. Complainant can prevail by demonstrating "that the proffered reason was not the true reason for the employment decision", *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248,250 (1981). Complainant can do this by proving by a preponderance of the evidence either that employer was more likely motivated by complainant's protected conduct or that the stated reason for complainant's discharge was in fact a pretext. *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 804 (1972); *Burdine*, at p. 256. "In short the [administrative law judge] must decide which party's explanation of the employer's motivation it believes." *U.S. Postal Service Board of Governors v. Aikens*, 103 S. Ct. 1478, 1482 (1983).

In concluding that employer's stated reasons were pretextual, Judge Warshaw thoroughly reviewed and weighed the evidence, and

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explained the inferences he drew therefrom. Although I do not agree with all of Judge Warshaw's intermediate conclusions,[4] I do agree that complainant has established by a preponderance of the of the evidence that KG&E's reasons for his termination were pretextual. The administrative law judge's finding on complainant's prima facie case together with his other findings namely the failure of KG&E to investigate the complaints against complainant, the failure of KG&E to offer any counsel or warning prior to the June 20, 1983 meeting at which it planned to dismiss complainant, the disparate treatment accorded another employee who did not meet the educational prerequisites for employment with KG&E, the short period of time allowed complainant to produce the documentation as to his Calhoun College credits and his Daniel's employment, and the curtailment of that period, the significance of Reeves' removal of complainant's discrepancy report from the typing box and the date stamping thereof, and the refusal of KG&t to re-employ the complainant, are sufficient to support the conclusion that it has been established by a preponderance of the evidence that KG&E's reasons for termination of complainant are pretextual. Accordingly, I find that KG&E's termination of complaint is in violation of section 5851.

Therefore, Kansas Gas and Electric Company is Ordered:

1. To reinstate Complainant, James E. Wells, Jr., to his former or to a substantially equivalent quality assurance inspection position;

2. To pay to Complainant, James E. Wells Jr., all wages an compensation (including the 168.00 per week stipend) that he would have received from the date of his termination to the date of his re-instatement;

3. To pay interest on the amount of wages and compensation provided in item 2 above at the rate prescribed by 28 U.S.C. 1961;

4. To expunge from its records all memoranda and or reference to the disciplinary action taken against complainant James E. Wells, Jr., as well as any reference of its refusal to re-employ him after August 4, 1983;

5. To post on the bulletin boards of its Wolf Creek Generating Plant facility in Burlington, Kansas a copy of this order for a period of thirty days; and

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6. To pay to complainant's attorneys, Guy, Helbert, Bell & Smith, all costs and expenses advanced by them in bringing this complaint as well as their reasonable attorney fees.

RAYMOND J. DONOVAN
Secretary of Labor

[ENDNOTES]

[1] In accordance with the requirements of 29 CFR Part 24, the complaint was first investigated by the Wage and Hour Division, U.S. Department of Labor, which directed KG&E to reinstate complainant and to take other remedial action. Subsequently, at KG&E's request, the case was referred for a de novo formal hearing on the record.

[2] The presence of the security guards was to assist in carrying out complainant's discharge.

[3][Editor's Note: In the slip op., this footnote is numbered "4"] KG&E also suggests that complainant has failed to establish a prima facie case because he did not prove that he was treated less favorably than other employees. Complainants are not required to prove that similarly situated individuals are treated differently. *DeFord v. TVA*, 700 F.2d 231 (6th Cir. 1983). Nevertheless, he record establishes that another employee, who was unable to substantiate graduation from high school, which is an employment requirement, was not discharged but allowed to take the high school equivalency test.

[4] [Editor's Note: In the slip op., this footnote is numbered "5"] The administrative law judge found that complainants "[e]mployment at Daniel's fell outside the purview of the background investigation which is normally limited to the previous five years." D&O, p. 11, fn. 2). The record evidence clearly established the period of complainant's employment at Daniels as between November 1978 to January 1979. The five year period thus would not have elapsed until January of 1984, seven months after complainant filled out the personal history form. Employment at Daniel's was, therefore, within the "previous five years. However, the importance of the Daniel's employment is not when it occured but that complainant could and did eventually provide the necessary verification and that KG&E did not wait for and did not accent the verifying documentation. The administrative law judge also found that the discharge action "was taken contrary to Respondent's progressive disciplinary policies " (D&O, p. 15). The only record evidence

as to KG&E's disciplinary policies is found in the testimony of Rudolph, who responded affirmatively to the judge's question as to whether KG&E follows a system of progressive discipline. Rudolph did not give any details as to the requirements of the KG&E system but merely indicated that he did not agree with the judge's statement that a verbal reprimand was of lesser degree than a written reprimand. Proof that KG&E did not follow its disciplinary policies in terminating complainant is not a requirement for a finding of pretext, since termination can be illegally motivated even where the employer follows to the letter his established disciplinary system.